

Delta Stewardship Council  
REQUEST TO ADDRESS THE COUNCIL  
Sacramento, CA

9:48 a.m.

9:56 a.m.

DATE: 1/24/13

AGENDA ITEM NO.: \_\_\_\_\_

NAME (Please print):

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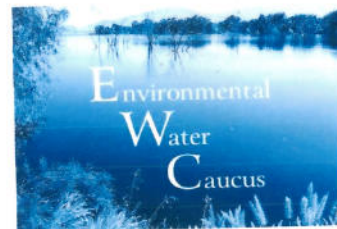
IF THIS IS A NON-AGENDA ITEM, PLEASE STATE THE SUBJECT MATTER TO BE PRESENTED:

COMMENTS:

(PLEASE COMPLETE FORM AND SUBMIT TO STAFF)

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EWC  
RULEMAKING COMMENTS

1/24/13

EWC's overall critique of the Delta Plan process is that it still lacks three critical analytical components: a water supply analysis, a cost-benefit analysis, and a public trust analysis. Along similar lines, EWC also has deep concerns with the CEQA treatment.

EWC provided extensive comments on the Proposed Regulation, which can be found on page 102 of our January 14, 2013 comprehensive comments and are also being submitted as a separate document today.

To summarize, EWC believes that the proposed regulation does not satisfy the mandate to carry out a legally enforceable Delta plan that protects the co-equal goals as set forth in the Delta Reform Act.

Instead, the Proposed Regulation *excludes actions that should be classified as covered actions and includes policies that fall outside of the regulation's enabling statute.*

First, the covered actions are defined too narrowly. Under the definitions of Section 5001(s), "Significant Impact" is inappropriately defined as a "change in baseline conditions." Rather than based on so-called baseline conditions, the definition should be revised so that "significant impact" is measured on an absolute scale. Without this change there will be a large cross-section of actions with impacts on the co-equal goals which will be improperly excluded from covered actions under the Delta Plan.

Second, exemptions from the Delta Plan (Sections 5002, and 5003), exceed the statutory authority provided by the Delta Reform Act. The Delta Plan's co-equal goals include economic and cultural values not contemplated by the California Environmental Quality Act, or CEQA. Yet the Draft Regulation adopts much the same exemption criteria as CEQA, but without CEQA's statutory basis for those exemptions – an impermissible conflating of the two statutes. CEQA's exemption criteria may not be adopted by the Proposed Regulation without statutory authority, which it lacks. Likewise, statutory basis for the emergency exemption (5003, b, 2, B) is not contained in the Delta Reform Act; there should be no emergency exemption for compliance with the Delta Plan without adequate statutory basis.

Exclusion of Temporary Water Transfers (Section 5003, b, 2, C). It is not stated why these transfers are excluded, as they would otherwise be covered actions under the Delta Plan. As we know, temporary transfers can be very large and can reoccur for consecutive years, giving them the impact of a permanent transfer. The exemption for temporary transfers exceeds the statutory authority for the Delta Plan and should be removed.

Reduced Reliance on the Delta (Section 5005). Throughout the Proposed Regulation, but particularly in regard to reducing reliance on the Delta, a lack of measurable results, meaningful performance measures, undermine the legitimacy of consistency determinations within the Delta Plan. Without quantifiable assessments in the consistency determinations, the plan will not be legally enforceable. If a project does not



make a quantifiable improvement in achieving the co-equal goals, then it should not receive a consistency determination.

Violations Of CEQA And Public Trust Doctrine (Section 5005(E)). The Regulations including calling for “improve Delta conveyance and operations”, and “optimize diversions in wet years. . .” cannot be lawfully adopted because there has been failure to comply with CEQA for all the reasons set forth in our comments pertaining to the Recirculated PEIR. The Regulations calling for improved - meaning new - conveyance also cannot be lawfully adopted because there has been failure to perform cost benefit and public trust doctrine analysis to ensure protection of the Delta.

Separately, because the DSC is a trustee agency, the Proposed Regulation must require the Council to consider whether a covered action is consistent with the public trust doctrine **and make a consistency determination on that basis**. The Council *must* make a consistency determination—this is a ministerial duty which the DSC **must** fulfil when judging a covered action. The Proposed Regulation’s failure to include a public trust consistency determination as a component of judging a covered action violates the public trust doctrine and associated caselaw on its face.

Updated Flow Objectives. (Section 5007). The Delta Reform Act does not require that that the Delta Stewardship Council direct, manage, or provide guidance for the State Water Board’s setting of Delta flow requirements. Rather, the Delta Reform Act requires that the State Water Board update Delta flow objectives consistent with the public trust doctrine, based on recommendations from the Department of Fish and Game,

part of the State Water Code. To emphasize this point, the Delta Reform Act clearly states that “nothing in this division expands or otherwise alters the State Water Board’s existing authority to regulate the diversion and use of water” and furthermore, the Act “does not affect” the public trust doctrine. As a result, the Council has no authority to propose a regulation that guides or places any conditions on the State Water Board’s setting of Delta flow requirements. Instead, the State Water Board is required to “submit its flow criteria determinations pursuant to this section to the council.”

Further, to the extent that this section of the Proposed Regulation purports to set out criteria to determine whether the Board’s delta flow requirements are consistent with the regulatory policies of the Delta Plan, it is plainly contrary to the scope of the Act. This section exceeds the scope of the enabling statute and should be removed.

Perhaps most critically, the Delta Reform Act does not allow the Water Board to set Delta flows that are “necessary to achieve the co-equal goals,” as stated in § 5007. Rather, Delta Reform Act and judicial precedent require the Board to set such goals consistent with the *Public Trust doctrine*, and the co-equal goals are *not* synonymous with the protection of Public Trust resources. As written, this section perverts the express language of the Delta Reform Act regarding the Board’s duty to abide by the public trust doctrine when setting Delta flows, and should be either removed or modified.